Supreme Court, U.S.
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88-1351

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL RHOADES and MILTON BRATEN,

Petitioners,

vs.

BANKERS TRUST COMPANY, et ano.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in reversing the dismissal of a complaint under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C., Sec. 1961 et seq. ("RICO") by a creditor against the officers of a corporation in a pending proceeding under Chapter XI of the Bankruptcy Act, alleging injury attributable to the depletion of the corporation's assets, on a finding of law that the Bankruptcy Act, which limits the rights of creditors to bring separate actions, does not affect a creditor's standing to assert a civil RICO claim?

2. Did the Court of Appeals err in reversing the dismissal with prejudice on limitations grounds of a creditor's

RICO action filed more than six years after the creditor first sought relief in a bankruptcy proceeding on the same facts, and in ordering a dismissal without prejudice, to allow the creditor to file a new action after the termination of the bankruptcy proceeding, on the ground that the period of limitations applicable to RICO claims, is governed by a rule of separate accrual, and does not begin to run until the termination of the insolvency proceedings in which the creditors could receive payment that would reduce or eliminate any damages that otherwise might be recoverable in a RICO action?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioners Daniel Rhoades ("Rhoades"), and Milton Braten

("Braten"), and respondents Bankers Trust Company ("Bankers"), and Herman Soifer ("Soifer"), who is the petitioner in his own separate proceeding, seeking a Writ of Certiorari to the Second Circuit, as well as being a respondent for the purposes of the petition of Rhoades and Braten.

In the court below, Rhoades, Braten and Soifer were appellees, and Bankers the appellant.

Petitioners have no parent companies, subsidiaries or affiliates as those terms are used in Supreme Court Rule 28.1.

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In The

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October Term, 1988

DANIEL RHOADES AND MILTON BRATEN,

Petitioners,

-against-

BANKERS TRUST COMPANY, et ano.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Rhoades and Braten respectfully pray that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit which reversed a judgment of the United States District Court for the Southern District of New York dismissing this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-25a)[1] is reported at 859 F.2d 1096 (1988). The order of the Court of Appeals, denying a petition for rehearing and suggestion for rehearing en banc (App. 26a), is not reported.

Opinions of the United States District Court for the Southern District of New York dismissing complaints herein are reported in 676 F. Supp. 496 (S.D.N.Y. 1987)(App. 27a-40a) and in 648 F.Supp. 17 (S.D.N.Y. 1986)(App. 41a-75a).

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[1] Soifer, a party to the proceeding below, has filed a separate Petition for Writ of Certiorari (No. 88-_____). The appendix submitted with that petition is a joint appendix and should be deemed submitted in connection with this petition as well. References to "App." are to the joint appendix of petitioners, Soifer, Rhoades and Braten.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1988. (App. 26a-1). Rehearing was denied by order entered November 14, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

The statutory provisions involved in this proceeding are relevant portions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1979, as amended, 18 U.S.C. Sec. 1961-1964 (1978)(App. 76a-88a).

STATEMENT OF THE CASE

Petitioners Rhoades and Braten join in petitioning this Court for a Writ of Certiorari to the United States Court

of Appeals for the Second Circuit, in an action that Bankers brought against Rhoades, Braten and Soifer. As previously noted, a separate petition for a writ of certiorari has been filed by Soifer, who, together with Rhoades and Braten, have filed a joint appendix to their petitions for a writ of certiorari.

Petitioners Rhoades and Braten, in support of their petition, respectfully refer the Court to the Statement of the Case set forth in Soifer's Petition for a Writ of Certiorari. Rhoades and Braten, for purposes of their application, adopt and incorporate by reference Soifer's Statement of the Case.

SUMMARY OF ARGUMENT

Any loss by Bankers of a legitimate

debt claim provable as to Braten Apparel Corporation ("BAC") is payable only out of funds that may be available to all creditors of BAC. The Bankruptcy Act does not permit any creditor to obtain a greater recovery than any other creditor. Unless the bankruptcy court otherwise orders, neither Bankers nor any other creditor of BAC may pursue, on its own behalf, the right to secure payment of any indebtedness owed by BAC. The court below incorrectly conferred standing on Bankers to pursue a separate RICO claim.

Even if Bankers had standing to pursue its loss of an alleged legitimate debt claim, dismissal of Bankers' RICO action, with prejudice, should have been ordered. Bankers' claim is time-barred on any theory. The pendency of the BAC bankruptcy

proceeding did not render that claim speculative and unprovable so as to warrant the deferral of its accrual until the termination of the Chapter XI proceeding.

REASONS FOR GRANTING THE WRIT

Petitioners Rhoades and Braten respectfully refer the Court to the reasons for granting the writ, set forth in Soifer's Petition for a Writ of Certiorari. Rhoades and Braten, for purposes of their application for a Writ of Certiorari, adopt and incorporate by reference the reasons presented by Soifer in his petition.

CONCLUSION

Petitioners Rhoades and Braten respectfully request that this Court issue a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Second Circuit.

Dated: Pleasantville, New York
February 9, 1989.

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